IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-86

CHARLES LESTER GREGG, *Appellant,*

-vs-

STATE OF INDIANA, *Appellee.*

ON APPEAL FROM THE COURT OF APPEALS OF INDIANA

MOTION OF APPELLEE TO DISMISS OR AFFIRM

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The State of Indiana, Appellee herein, by Theodore L. Sendak, Attorney General of Indiana, and Elmer Lloyd Whitmer, Deputy Attorney General, moves this Court to dismiss the appeal herein, or affirm the decision of the Indiana Court of Appeals (reported at 356 N.E.2d 138), and in support of said motion offers the following:

GROUNDS FOR DISMISSAL ON SUMMARY REVIEW

1. This appeal is not within the jurisdiction of this Court, for the reason that it is not in conformity with the rules of this Court (Supreme Court Rule 16, 1(a).).

2. The appeal herein does not present a substantial federal question for review (Supreme Court Rule 16, 1(b).).

3. It is manifest that the questions on which the decision in this appeal depend are so unsubstantial as to not need further argument but are clearly apparent in the decision below (Supreme Court Rule 16, 1(c).).

4. This appeal would require a review of the weight of the evidence and credibility of the witnesses in the trial, an improper invasion of the province of the trial jury (Supreme Court Rule 16, 1(d).).

5. This Court is not obligated to grant plenary review of the question herein presented under 28 U.S.C. 1257 (2), but instead may dismiss on summary review, without opinion.

ARGUMENT

I.

JURISDICTION IS DENIED

The Appellant complains of the "strange and perhaps wayward application" of the Indiana statute in the case at bar, and that this "application" bestows jurisdiction on this court to grant plenary review of the question herein. Appellant concedes the statute, Indiana Code 35-5-2-1 and 35-5-2-2, is not unconstitutional on its face or necessarily unconstitutional in every application, but "only in its application here". Appellant states: "The statute took the ability to prove sanity away from the Appellant, but it gave no adequate proof instead." (Page 6, Appellant's Jurisdictional Statement). The words of the statute (page 3, *Ibid*) refute any truth in this statement. Provision is made in the statute for the introduction of testimony of medical experts by each party in the trial, in addition to the court's witnesses required by the statute.

However, the statute does not require a statement of opinion or the conclusion of such witnesses, only their testimony. Appellant's sole basis for appeal is the absence of such opinion in their testimony, and asserts on this omission the trial court failed to "muster the proof on the insanity issue" (page 8, *Ibid*). Therefore, Appellant has not convincingly shown how the nature of his case and the decision of the Indiana Court of Appeals places this appeal within the jurisdiction of this Court under Supreme Court Rule 15, 1(e).

II.

THERE IS NO SUBSTANTIAL FEDERAL QUESTION

The case at bar is distinguished from *Pate v. Robinson*, 383 U.S. 375, 86 S. Ct. 836 (1966), relied on by Appellant. In *Pate v. Robinson* the issue concerned competency of a defendant to stand trial, and whether the trial court was required to *sua sponte* conduct a hearing on this question. The duty of a judge to determine the competency of a defendant for trial does not relate to proof of competency, under laws of insanity, at the time of the offense, as a defense, which is the question in the case at bar. The duty of the trial court under the Indiana statute required only the production of medical witnesses by the court, not *proof* of any matter. *Pate* is not applicable herein.

Appellant asserts the trial court's application of the statute deprived Defendant Gregg of an opportunity to present evidence of expert testimony on the sanity of Defendant, as though the statute bars all other expert (medical) testimony. To the contrary, the statute expressly provides that each party may present such testimony. I. C. 35-5-2-2. The opinion of the Indiana Court of Appeals reveals Defendant Gregg, prior to trial, was authorized by the court to retain a psychiatrist to examine Defendant,

but evidence therefrom was not introduced at trial. See the Court of Appeals' reference to a "sleeping dog", page 9-A, Appellant's brief.

Appellant's sole authority for the "general importance" of the question here presented are two quotes from a book on insanity as a defense, by a professor, but otherwise not documented or identified as a publication of any merit. The quotations presented for authority are patently inappropriate and reflect only subjective surmises of the author, whose experience is not presented. Such pseudo-authority need not be persuasive to this Honorable Court.

III.

APPELLANT WAS NOT DENIED DUE PROCESS

This Court long ago said "due process and equal protection of the laws are secured if the laws operate on all alike and do not subject the individual to an arbitrary exercise of the powers of government", in *Duncan v. Missouri,* 152 U.S. 377, 382, (1894). Recently this Court, in *U.S. v. MacCollom,* — U.S. —, 96 S. Ct. 2086 (1976), said neither the protection of the 14th Amendment or the 5th Amendment to the United States Constitution guarantees absolute equality or precisely equal advantages, but the context of criminal proceedings requires only adequate opportunity to present one's claim fairly. Under these definitions, the Indiana statute herein questioned, does not deny due process or equal protection as applied by the trial court.

IV.

APPELLANT SEEKS REVIEW OF THE EVIDENCE

Appellant asserts the failure of the trial court to "muster proof on insanity" was all the worse because "it is plain the jury was swayed by the incomplete proof on

the insanity issue" and that it is likely Defendant would have been acquitted if there was an opinion from each of the court's medical witnesses (page 8, Appellant's brief). Appellant desires not a fair trial, but acquittal, under the Statute.

The fallacy of Appellant's argument is his assertion the Indiana statute denies a defendant the "ability to prove his own sanity" (page 10, *Ibid*). Appellant says "the authority with which the impartial expert is cloaked in court cannot be challenged easily by the defendant . . . " (page 9 *Ibid*). Yet herein Appellant complains of the absence of an opinion of the witness in such testimony. The contradiction should be apparent. Defendant was better served without such opinions, it may be assumed. As it was, without opinions, the jury was presented with *raw evidence* on the mental condition of Defendant and thus could determine the issue of insanity without such partiality of the medical witnesses' opinions. To review the weight of such evidence, or determine the credibility of the medical witnesses, is beyond the scope of review and the jurisdiction of this Court in this appeal, on competency of the Indiana statute.

V.

SUMMARY REVIEW AND DISMISSAL IS PROPER

Under 28 U.S.C. 1257 (2) this Court may properly deny the appeal presented by Appellant, in summary review, without briefs or oral argument. *Colorado Springs Amusement Co. v. Rizzo,* — U.S. —, 96 S. Ct. 3228 (1976); *Hicks v. Miranda,* 422 U.S. 332, 95 S. Ct. 2281 (1975). See also *Sidle v. Majors,* — U.S. —, 97 S. Ct. 367 (1976), involving an Indiana statute.

CONCLUSION

WHEREFORE, the State of Indiana, Appellee herein, respectfully moves the Court to dismiss the appeal herein, or affirm the judgment of the Indiana Court of Appeals and the Indiana Supreme Court, by summary review; and for all other proper relief in the premises.

Respectfully submitted,

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